91-1523

Supreme Court, U.S.
FILED
MAR 23 1992
OFFICE OF THE CLERK

No. 91-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ERNEST K. NICHOLSON, SUPERINTENDENT, IN HIS OFFICIAL CAPACITY, AND SCHOOL BOARD MEMBERS BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM, ELRITA BACOTE, T.R. GREEN, JAMES W. HICKS, IN THEIR OFFICIAL CAPACITY,

Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

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QUESTIONS PRESENTED

1. Whether a learning disabled child's parents are entitled to state reimbursement under the Individuals with Disabilities Education Act (IDEA), when they unilaterally place her in a private school that does not meet state educational standards or in other respects satisfy the criteria of a "free appropriate public education," which the state is required under 20 U.S.C. §§ 1401(a)(18) and 1412(1) to provide as a condition of receiving federal funding under the Act.

2. Whether a federal court may set aside an "Individualized Education Program" promulgated in accordance with the procedures called for in the IDEA, and affirmed on review by the state educational agencies, on the basis of achievement goals contained in the plan, notwithstanding substantial evidence that the child received educational benefits under the plan.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were the petitioners Florence County [South Carolina] School District Four, the School District's Superintendent Ernest K. Nicholson, in his official capacity, and school board members Bennie Anderson, Monroe Friday, Jack Odom, Elrita Bacote, T.R. Green, and James W. Hicks, in their official capacity.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. 91-____

Florence County School District Four,
Ernest K. Nicholson, Superintendent,
in his official capacity, and School Board
Members Bennie Anderson, Monroe Friday,
Jack Odom, Elrita Bacote, T.R. Green,
James W. Hicks, in their official capacity,

Petitioners,

v.

Shannon Carter, by and through her
father and next friend, Emory Carter,

Respondents.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

The Florence County, South Carolina, School District Four petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 950 F.2d 156 (4th Cir. 1991). It is reprinted at pages 1a-19a of the appendix to this petition. The order and decision of the district court are unreported and are reprinted at pages 20a-39a of the appendix to this petition.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1991. On February 11, 1992, Chief Justice Rehnquist entered an order extending the time in which to file a petition for writ of certiorari to and including March 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant sections of the Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400-1485 (West 1988 & Supp. 1991), its accompanying regulations, 34 C.F.R. §§ 300.1-300.754 (1991); and certain provisions of South Carolina law, are set forth in the Appendix. App. 56a-72a.

STATEMENT

The decision below concerns the nature and extent of a state's obligation under the IDEA to provide a free appropriate public education, which has been addressed in this Court's decisions in *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982)

and *Burlington Sch. Comm. v. Massachusetts Bd. of Educ.*, 471 U.S. 359 (1985).

2 1. *The Statutory Scheme*: The Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400-1485 (West 1990 & Supp. 1991) ("IDEA" or "Act"), formerly titled the Education of the Handicapped Act, imposes both substantive and procedural obligations on states as a condition of federal funding to aid in educating children with disabilities.[1] Substantively, states receiving federal funds are required to provide such children with a "free appropriate public education," 20 U.S.C. § 1412(1), which must, under the statute, be provided at public expense and under public supervision and direction, meet the standards of the state educational agency, and be provided in conformity with an "individualized education program" ("IEP") allowing it to be tailored to the needs of the child. 20 U.S.C. § 1401(a)(18). The IEP is prepared at a meeting between a qualified representative of the local education agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child. 20 U.S.C. § 1401(a)(20).

By statute, the IEP consists of a statement of (1) the child's "present levels of educational performance";

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[1]The federal assistance provided under the Act varies from state to state and from year to year, but in no event makes up more than a small fraction of the cost of providing the special education services required under the statute. In 1991, the federal government contributed an average of $407 per disabled child, which represents approximately 7% of the additional cost of educating a disabled child, over and above the average cost of educating a non-disabled child. U.S. Dept. of Education, Justification of Appropriation Estimates to the Congress Fiscal Year 1993 at F-19 (1992).

(2) "annual goals, including short-term instructional objectives"; (3) "specific educational services to be provided"; (4) a "date for initiation and anticipated duration" of services; (5) "needed transition services for students . . . including, when appropriate, a statement of the interagency responsibilities . . ."; and (6) "objective criteria and evaluation procedures" for determining whether the objectives are being met. 20 U.S.C. § 1401(a)(20). Under the Act, the IEP must be reexamined and reevaluated prior to the start of each school year. 20 U.S.C. § 1414(a)(5).

Procedurally, the IDEA requires the state to provide "an opportunity to present complaints with respect to any matter relating to . . . the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(1)(E). Upon receipt of a complaint, the local education agency must provide parents with a hearing before an impartial arbiter. 20 U.S.C. § 1415(b)(2). Review of this local agency decision is available before the state education agency. 20 U.S.C. § 1415(c). The state agency's decision, in turn, is reviewable in federal district court, 20 U.S.C. § 1415(e)(2), through a two-part inquiry looking, first, at whether the state complied with the procedures set forth in the Act, and, second, at whether "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits[.]" *Rowley*, 458 U.S. at 206-07.

2. *Facts*: Petitioner Shannon Carter began first grade at the local public school in Florence County [South Carolina] School District Four in Fall of 1975.

App. 23a (JA 47).[2] For second grade, Shannon's parents withdrew her from the public school and enrolled her in a private school (Roy Hudgens Academy) in a neighboring county, so that she could, as her mother stated, "be with the children that she was with in our community, at church." (JA 48) Shannon completed her elementary education at the private school. App. 23a. In the fall of 1982, her parents re-enrolled her in the Florence County public school to begin the seventh grade. *Id.* at 24a.

At the request of Mrs. Carter, in early 1983, the junior high school guidance counselor tested Shannon's I.Q. and achievement levels. In February 1983, the guidance counselor requested that the school district's educational evaluator conduct similar tests, and he administered one intelligence and one achievement test to Shannon in February 1983. The test scores indicated that Shannon was slightly below average in achievement, but reflected no learning disability. App. 24a (JA 49).

In March 1985, upon discovering that Shannon had altered her report card to reflect better grades than she was actually receiving, Shannon's mother contacted the school district about her concerns. (JA 100-101). She informed the District that she was considering placing Shannon in a private school (JA 101), and it was agreed that a further evaluation of Shannon would be conducted. Those tests, conducted on April 13, 1985, suggested that Shannon had a serious learning disability. App. 25a.

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[2] "JA" refers to the joint appendix filed with the court of appeals. Copies of that joint appendix have been lodged with the Clerk for the Court's convenience.

During this time period -- before any IEP was formulated -- Shannon's parents made clear in a number of ways that they preferred not to have their daughter attending the public school, that they were skeptical of the District's ability to provide special education services, and that part of their concern related to the racial make-up of the school.[3] The record includes a statement by the psychiatric social worker hired by the Carters to assist in dealing with Shannon's situation, to the effect that Shannon's "parents did not want Shannon to go to the predominantly black school in Timmonsville." (JA 39, 360). Nonetheless, at meetings during the latter part of April 1985, District officials gave Mrs. Carter the results of the evaluation, described to her various educational programs that would be helpful to Shannon, and explained and provided her with a written description of the process for determining the proper program, and the procedural rights under the IDEA attendant to that process. (JA 106, 109, 143).

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[3]Ms. Nelson, a district official, recounted statements by Mr. Carter on April 13, 1985, to the effect that he knew that the District could not provide an appropriate program for Shannon, and that "our teachers could not read or speak English, much less teach it." (JA 105). Ms. Summer, the psychiatric social worker hired by the Carters also informed Ms. Nelson that "the Carters were not interested in special education services . . . from [District 4]." (JA 109).

Further, Ms. Nelson stated that Mrs. Carter offered as reasons not to allow Shannon to try out for cheerleader that "Shannon would have to ride the bus with those students," and "[y]ou know yourself that the students at this school are nothing but scum." (JA 104). Mrs. Carter denied that she ever stated that she did not want Shannon associating with other students (JA 141), or (in testimony omitted from the joint appendix in the court below) that she had ever used the word "scum." (JA 142).

A meeting was held on May 1, 1985, to formulate the specifics of an IEP for Shannon. The school district proposed that Shannon remain in regular classes to a substantial degree, consistent with the IDEA's "mainstreaming" requirement, 20 U.S.C. § 1412(5)(B), and spend at least one period per day five days per week in the resource room where she would receive intensive help along with two to four other students. (JA 121, 123). Shannon's parents objected to the proposed "resource room" placement. Instead, they requested an "itinerant program" in which Shannon would work one-on-one with a particular teacher whom the parents specified, notwithstanding that it would involve fewer hours of special instruction per week than would be possible under the "resource room" placement.[4] App. 26a n.7. The school district ultimately approved the itinerant placement.

In addition, the social worker hired by Shannon's parents encouraged the District to minimize pressure on Shannon and to set goals in such a way as to minimize Shannon's risk of failure. (JA 278, 282-286). After some discussion, the IEP was signed by both Shannon's parents and representatives of the District, incorporating the itinerant proposal and setting goals of four months' progress in reading and four months' progress in math during the school year, goals which would be viewed as the minimum gains to be achieved. App. 27a (JA 282, 284, 365-377). It became effective May 2, 1985, and

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[4]Under the itinerant approach, Shannon received individualized attention from a special education teacher three days per week, and counseling with the librarian one period each of the other two days of the week. (JA 122).

stated immediately below the signature lines that "Parents and school personnel may request another IEP meeting at any time they feel that a change is needed in the student's IEP." (JA 366). Shannon's grades improved substantially in the grading period immediately following implementation of the IEP, and were sufficient at the end of the spring term to allow her to pass the ninth grade. (JA 149, 263, 269, 271, 292-293).

Despite the significant improvement in Shannon's grades, her parents disputed the appropriateness of the educational program and requested a hearing. App. 5a. During that same period, Shannon also applied for admission to Trident Academy, a private school for learning disabled children. (JA 169-70). On August 8, 1985, Shannon was accepted for admission to Trident, where she enrolled in the fall of 1985 and for the next three years, graduating in the Spring of 1988. During the time that Shannon was there, Trident did not utilize the IEP procedure, and employed a number of teachers who were not certified in accordance with South Carolina state law. App. 11a-12a (JA 195-96, 200-201).

At a due process hearing conducted on August 20, 1985, the local education agency hearing officer rejected the challenge of Shannon's parents to the District's placement of her. App. 44a-55a. On appeal of that decision to the state education agency, on October 14, 1985 the state hearing officer affirmed the decision, holding that "the concept of least restrictive environment is violated in the extreme by removing this child from her natural family so that she might attend an institution alleged to have a better program than the public school setting." *Id.* at 42a.

3. *Judicial Proceedings*: In July 1986, over eight months after the hearing officer issued his decision and after Shannon had completed the tenth grade at Trident Academy, her parents filed suit on her behalf in the United States District Court for the District of South Carolina. The complaint alleged that the school district had failed to offer Shannon a "free appropriate public education" within the meaning of the Act, and had failed to comply with the Act's procedural requirements. Shannon's parents sought actual damages and retroactive reimbursement for tuition and other costs so far incurred.

The district court, following an evidentiary hearing, concluded in an unpublished opinion that the school district had not breached the procedural requirements of the Act, but ruled that the school district had failed to provide Shannon with a free appropriate public education under the Act. App. 22a-39a. The court held that the IEP was inadequate, looking principally to the limited goal of four months' progress in mathematics and reading which it set, and commenting that "Shannon was in need of an intensive self-contained L.D. environment to afford her with an individualized special education to meet her unique needs." *Id.* at 27a.

The court ruled, further, that the education offered at Trident had been appropriate for Shannon, and that the expenses incurred in sending her there -- which totalled more than $35,000 over a three year period for tuition and fees, room and board, mileage to school and four trips home per year -- were reasonable. The court noted that "the defendant has offered no evidence that Shannon could have received the special educational services provided by Trident at any facility closer to her home or at a lower cost." App. 30a (footnote omitted).

Accordingly, it ordered the school district to provide reimbursement for these costs. *Id.* at 39a.

On appeal, the Court of Appeals for the Fourth Circuit first addressed the School District's assertion that the IEP did, in fact, provide for an "appropriate education." Acknowledging the test set forth in *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), stating that a free appropriate education is one that is "reasonably calculated to enable the child to receive educational benefits," the Fourth Circuit held that the School District's program was inappropriate because "a goal of four months' progress over a period of more than one year was rather modest for a student such as Shannon and was unlikely to permit her to progress from grade-to-grade with passing marks." App. 8a. The court dismissed the statutory requirement that disabled students be kept in classes with non-disabled children to the maximum extent appropriate, 20 U.S.C. § 1412(5), as assuming only "a subordinate role" in the formulation of an educational program. *Id.* at 8a-9a.

Turning to reimbursement, the court looked to this Court's decision in *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359 (1985), which allowed parents to receive reimbursement from the school district where they placed their child in a private school in the face of an inappropriate placement offered by the public school. App. 10a-11a. The court noted that, unlike this case, in *Burlington* the state's department of education had approved the parents' private school placement. It noted further the District's contention that no such state approval was or could have been given in this case, based on the facts that Trident does not comply

either with the terms of the IDEA, or with the teacher certification requirements applicable to public school teachers. App. 11a-12a.[5]

The court found these facts not to be "fatal to the request for reimbursement," however. App. 12a. It recognized the existence of a conflict in the circuits on the issue of whether reimbursement should be allowed under the Act in the absence of state approval of a private school chosen by the parents. App. 15a. Rejecting the position taken by the Second Circuit in *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563 (2d Cir. 1989), the court construed the language of 20 U.S.C. § 1413(a)(4)(B) to require that private schools meet state and Act "educational standards" only when the child is placed in the private school by the state or local school authorities, noting that it has no relevance where the parents place the child unilaterally. *Id.* at 13a. The court concluded that permitting reimbursement only as to state-approved private schools "would undermine the values and policies [of] the Act." The court also found it "hardly . . . consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place." *Id.* at 17a-18a.

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[5]The court noted that, at the time of trial, at least two faculty members at Trident, including one of Shannon's teachers, were not certified by the State of South Carolina. App. 11a.

REASONS FOR GRANTING THE WRIT

This case presents a question not addressed in *Burlington*, on which there is now a direct conflict in the circuits: Whether parents unilaterally electing to send their child to a private school in the face of an allegedly inappropriate placement offered by the public school authorities, may collect governmental reimbursement even though their private school placement does not satisfy the IDEA's requirements for a "free appropriate public education." By answering this question in the affirmative, the Court of Appeals for the Fourth Circuit allowed parents to receive reimbursement with public funds for their child's private education, notwithstanding that the education they select meets neither the state's educational standards nor the IEP requirements set forth in the Act. The court thus expanded the duty of public funding for private education beyond that required in the statute, to encompass various private school placements preferred by parents but not coming within the duty imposed on states by the statute.

Further, the Fourth Circuit held inappropriate an IEP that was formulated in full compliance with the procedural requirements of the Act and that clearly allowed the child to receive educational benefits, thus meeting the standard for court review of IEPs articulated by this Court in *Rowley*. By reaching this conclusion because the IEP's stated goals were "rather modest" -- where the parent's representative had specifically requested that the goals be set low in order to enhance the child's likelihood of success -- the court intruded into the policymaking domain of the state education agencies, contrary to the interpretation of the Act by this Court and by the other courts of appeals.

In both respects, the decision of the court below violates the principle stated by this Court in a variety of contexts, that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Wood v. Strickland*, 420 U.S. 308, 326 (1975)(overruled on other grounds); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

I. THE DECISION BELOW CREATES A DIRECT CONFLICT OVER WHETHER PARENTS OF A DISABLED STUDENT MAY BE ENTITLED TO REIMBURSEMENT UNDER THE ACT WHERE THEY UNILATERALLY TRANSFER THEIR CHILD FROM A PUBLIC SCHOOL TO A PRIVATE SCHOOL WHICH IS NOT IN COMPLIANCE WITH STATE EDUCATIONAL STANDARDS AND OTHERWISE FAILS TO MEET THE STATUTORY DEFINITION OF A FREE APPROPRIATE PUBLIC EDUCATION

In order to qualify for federal assistance under the IDEA, a state must demonstrate that it "has in effect a policy that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. § 1412(1). The statute further defines the required "free appropriate public education" as "special education and related services that:

> (A) have been provided at public expense, under public supervision and direction, and without charge,
>
> (B) meet the standards of the State educational agency,

• • •

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title."

20 U.S.C. § 1401(a)(18). The state is to fulfill this obligation, where possible, by providing necessary services to the disabled student within the public school setting, with the child participating as much as possible in the same activities as non-disabled children. 20 U.S.C. § 1412(5). Where the public schools themselves are unable to provide the necessary services, the Act also provides for placement in an appropriate private school at governmental expense. *Burlington*, 471 U.S. at 369. Even where a private school or facility implements a child's individualized education program, responsibility for compliance with the statute remains with the public agency. 34 C.F.R. § 300.347(c).

In *Burlington*, this Court held that under the authority conferred on courts by the IDEA to "grant such relief as the court determines is appropriate," 20 U.S.C. § 1415(e)(2), parents who disagree with the placement offered by the school district may be allowed to recover reimbursement for the cost of unilaterally placing their child in a private school, provided that the "court determines that a private placement desired by the parents was proper under the Act and that the IEP calling for placement in a public school was inappropriate." 471 U.S. at 370. The question presented here is whether that right of reimbursement extends to parents' unilateral placements in private schools which fail to meet the statutory definition of a "free appropriate public education."

The court of appeals in this case ordered reimbursement of annual tuition and other costs totalling more than three times the District's average expenditures for children in public schools, notwithstanding that the education thus being funded concededly did not meet the standard of a "free appropriate public education" which the state is obligated to provide under the Act. The court noted specifically the fact that Trident was not and could not be approved for placement by the state educational agency because it employed faculty members -- including one of Shannon's teachers -- who were not certified by the state and could not teach in public schools. App. 11a-12a.[6] The Trident placement thus failed to meet the requirement of section 1401(a)(18)(B) that the services provided must meet the standards of the state educational agency. The court also noted that Trident "does not attempt to comply with the terms of the Act," although it does engage in periodic goal setting. App. 11a. In this respect, the placement at Trident failed to meet the requirement of 20 U.S.C. § 1401(a)(18)(D) that the services be provided in conformity with the

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[6]According to South Carolina's State Board of Education regulations, private schools in which handicapped children have been duly placed must be in conformity with the Defined Minimum Program for South Carolina School Districts ("DMP"). S.C. Code Regs. 43-243(E)(7). The DMP expressly requires that a teacher of handicapped children for grades 9-12 be "certified or hold a permit in the area of handicapping condition in which the majority of the pupils are served." S.C. Dept. of Educ., Defined Minimum Program for South Carolina School Districts at 52 (1986), App. 71a-72a. South Carolina law sets forth explicit educational prerequisites to certification to teach children with particular types of handicaps. S.C. Code Regs. 43-62(K). App. 62a-71a.

individualized education program required under section 1414(a)(5).[7]

The court of appeals did not contest these facts nor otherwise contend that the Trident placement met the statutory definition of a free appropriate public education. It rather turned its attention to a different provision of the statute, section 1413, concerning the required elements of a state's plan to implement the statute. One of those state plan elements, set forth in section 1413(a)(4)(B), concerns policies and procedures to assure that:

> (i) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, *if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency* . . .; and
>
> (ii) *in all such instances*, the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

[7]The required content of the individualized education program is set forth in 20 U.S.C. § 1401(a)(20), App. 56a-57a, and contains substantial requirements in addition to the setting of goals.

(emphasis as in court of appeals decision, App. 12a) The court concluded from this language that, except where a child is placed in or referred to a private school by the state or local educational agency, the IDEA does not require that the private institution meet state educational standards. App. 13a.

The court acknowledged that this conclusion stands in direct conflict with the Second Circuit's decision in *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563 (2d Cir. 1989). App. 15a.[8] In that case, the court focused on the language of section 1401(a)(18)(B), defining the "free appropriate public education" which a state is obligated to provide as a condition of receiving funds under the Act. It concluded that reimbursement must be denied for placement in a private school not on the state's list of approved schools, because a free appropriate public education is defined under the statute as one which meets the standards of the state educational agency. 873 F.2d at 568.

The court of appeals' reading of section 1413(a)(4)(B) to override the state's unequivocal obligation and authority under the Act to provide a free appropriate public education is contrary to the plain words of the statute. Section 1413(a)(4)(B) imposes affirmative duties as to what must be included in the plan

[8]The court of appeals also pointed to the decisions of two other courts supporting the proposition that reimbursement for an appropriate education is proper even in cases where state approval of the private school children is absent. *See Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1160-61 (5th Cir. 1986); *Carrington v. Commissioner of Educ.*, 404 Mass. 290, 294-96, 535 N.E.2d 212, 215-16 (1989).

submitted by the state educational agency. It does not purport on its face to define the full extent of the duties imposed by the statute unrelated to the content of that plan, and thus there is no basis to view it as any qualification of the state's basic obligation under section 1412(1) to assure all disabled children a free appropriate public education as defined in section 1401(a)(18).

More fundamentally, the court of appeals' reading proves too much by rendering the obligation to provide a free appropriate public education inapplicable where the private school placement is selected unilaterally by the parents. If section 1413(a)(4)(B) really denied the state any duty or authority to enforce sections 1401(a)(18)(B) and (D), concerning state educational standards and conformity with the IEP procedure, where the parents unilaterally place the child in a private school, it could only be because the state had no duty to provide a free appropriate public education in that circumstance. It would also, therefore, necessarily relieve the state of its obligation under section 1401(a)(18)(A) to provide an education at public expense.[9]

The court of appeals' error goes to the fundamental nature of the IDEA as a statute providing federal funding

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[9]Indeed the same result follows from the very language of section 1413(a)(4)(B)(i), taken in isolation, if one reads that section, as the court of appeals did, to set the outer limits of the state's statutory obligations. For within that very section, the obligation to provide special education and related services "at no expense to [the child's] parents or guardian," is, like the applicability of state educational standards, conditioned on the private school placement or referral being made by the state or appropriate local educational agency. *See* App. 58a-59a.

assistance on specified conditions, while leaving to the state and local educational agencies the "primary responsibility for developing and executing educational programs for handicapped children." *Rowley*, 458 U.S. at 183. Referral to a private school, whether by the school district, or unilaterally by the parents in the face of an inappropriate public school placement, *see Burlington*, does not terminate the state's obligation to the child under the statute, but is rather an alternative manner of fulfilling that obligation.[10] By demanding that the state provide a free appropriate public education, the statute imposes a continuing duty to see that those conditions are met -- not simply to pay the tuition and related bills submitted to it. 34 C.F.R. § 300.347(c).

Absent this continuing duty and authority on the part of the state to assure statutory compliance -- meaning the provision of a free appropriate public education as defined in the statute -- the IDEA would become a vehicle for serious mischief in the hands of loving parents seeking their vision of the best for their children at public expense. Under the court of appeals' decision, the incentive for parents to work closely with the governmental authorities is seriously weakened, contrary to the statute's clear intention to stimulate a stronger working partnership between parents and public school authorities. *See Rowley*, 458 U.S. at 205 (noting the great emphasis placed by Congress upon compliance with procedures giving parents and guardians a large measure

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[10]Of course, if a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required to pay for the child's education. *See* 34 C.F.R. § 300.403.

of participation at every stage of the administrative process). Parents may have a variety of reasons for preferring to circumvent rather than capitalize on public school services to address the problems of their disabled children,[11] and the decision below is an open invitation for them to do just that. *See Tucker*, 873 F.2d at 567.

As the decision greatly impairs the state agencies' ability to secure active parental cooperation, it goes further, on a financial level, and threatens their ability to function equitably or perhaps at all. If school districts lack the authority to disapprove unilateral parental selections which the district must ultimately fund, it can be anticipated that parents will often look for the best possible education, whose provision at public expense the Act clearly was not intended to guarantee. *See Rowley*, 458 U.S. at 192 ("the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.") The result of such parental cherry-picking will be to worsen an existing financial crisis, at the expense of those students remaining in the system.[12]

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[11]In this case, there is substantial evidence that the Carters were displeased with the very idea of their daughter attending the Timmonsville public school, and that their reasons for that view were related at least in part to the predominantly black racial make-up of the school. *See* note 3, *supra*.

[12]The present financial crisis which afflicts school districts across the country is well documented. *See, e.g.*, 29 Gov't Empl. Rel. Rep. (BNA) at 385 (April 1, 1991) ("The worst financial crisis to hit California education" has caused over 10,000 layoffs); Philip D. Block,

(continued on next page...)

This danger is well-illustrated by this case. The costs of educating Shannon at Trident, including tuition, travel costs associated with visits home, and room and board, amounted to more than $35,000, or nearly $12,000 per year. In contrast, the average per pupil expenditure in School District 4 is less than $3,900 per year. *See* S.C. Dept. of Educ., Ranking of the Counties and School Districts of South Carolina 1989-90 at 265, Table 96 (1991). School "resources are not unlimited and many other demands compete for limited public funds." *Lunceford v. District of Columbia Bd. of Educ.*, 745 F.2d 1577, 1583 (D.C. Cir. 1984). Every dollar redirected to respondents in this case is lost to the students of this rural, predominantly black district.

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[12](...continued from previous page)
Tough Action needed on school budget, Chicago Tribune, May 3, 1991, at 22 ("The Chicago public schools once again are facing a critical financial crisis.").

II. THE FOURTH CIRCUIT ACTED BEYOND ITS AUTHORITY UNDER THE ACT IN REJECTING AN INDIVIDUALIZED EDUCATION PROGRAM ("IEP") ON THE BASIS THAT THE GOALS STATED IN THE IEP WERE INSUFFICIENTLY AMBITIOUS, WHERE THE STATE AGENCY ACTED IN FULL COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS OF THE ACT, THE CHILD IN FACT RECEIVED SUBSTANTIAL EDUCATIONAL BENEFITS UNDER THE PROGRAM, AND THE GOALS STATED IN THE IEP WERE DELIBERATELY MADE MODEST AT THE REQUEST OF THE PARENTS' REPRESENTATIVE

In *Rowley*, this Court considered at length the standard set by the statute requiring that an "appropriate" education be provided, and the role of the federal courts in enforcing that guarantee. The Court there rejected contentions of a deaf student that the Act was intended to achieve actual equality of opportunity between disabled and non-disabled students, and concluded instead that a state satisfies the requirement of a free appropriate public education "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." 458 U.S. at 203. The Court further concluded that primary responsibility for "choosing the educational method most suitable to the child's needs" was left by the Act to the state and local educational agencies in cooperation with the parents or guardians of the child. *Id.* at 207.

Specifically with regard to judicial review, the Court stated that the judicial inquiry in suits challenging a particular placement is two-fold:

> First, has the State complied with the procedures set forth in the Act. And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits.[13]

458 U.S. at 206-207 (footnotes omitted). Following that approach, in the absence of a procedural dereliction, the courts of appeals have generally upheld IEP placements where the placement appears likely to enable the student to receive some educational benefits. *E.g.*, *Knight v. District of Columbia*, 877 F.2d 1025, 1029-1030 (D.C.Cir. 1989); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 993-994 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 1122 (1991); *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 152-154 (4th Cir.), *cert. denied*, 112 S.Ct. 175 (1991); *Rettig v. Kent City Sch. Dist.*, 788 F.2d 328, 332 (6th Cir.), *cert. denied*, 478 U.S. 1005 (1986); *Wilson v. Marana Unified Sch. Dist.*, 735 F.2d 1178, 1182-1184 (9th Cir. 1984); *Cain v. Yukon Public Schs., Dist I-27*, 775 F.2d 15, 20-21 (10th Cir. 1985).

Contrary to the approach of these and other courts, here the Fourth Circuit focused exclusively on the IEP's stated goals of four months' progress in math and reading to conclude that the program was "inappropriate" under the Act. It reasoned that Shannon was a "tenth-grade student whose reading and mathematics skills were at a

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[13]The Court noted in a footnote to this sentence that when a handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit. 458 U.S. 207 n.28.

fifth and sixth grade level," and thus that the district court did not err in finding that the stated goal of "four months' progress over a period of more than one year was rather modest for a student such as Shannon and was unlikely to permit her to advance from grade to grade with passing marks." App. 8a.

It is undisputed on this record that Shannon's grades did significantly improve during the one month that she was working under the IEP developed in discussions between the school district and her parents, and that her grades were good enough to allow her to pass the ninth grade. Even if goals, which play a relatively limited role in the context of an IEP,[14] could ever provide a basis for finding inappropriateness, they certainly do not do so here. In this case, the social worker hired by Shannon's parents urged that the goals not be set too high, in order to strengthen Shannon's self-confidence.

Accordingly, the court of appeals here has cavalierly set aside the IEP promulgated by the School District, and created a precedent which can be expected to mislead future courts. Given the very large number of cases in which IEP's are challenged in court,[15] review is therefore warranted to provide guidance to the courts of appeals in order that the "appropriate education" standard of the Act be accurately and consistently applied.

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[14]*Cf.* 34 CFR § 300.349 (goals and objective contained in the IEP do not bind the agency or any person).

[15]Since the decision was handed down in 1982, *Rowley* has been cited in over 300 federal district court and court of appeals published opinions. Review of many of these cases indicates that well over half involve challenges to IEPs under the Act.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

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March 23, 1992

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SHANNON CARTER, a minor by and through her father, and next friend, Emory D. Carter, *Plaintiff-Appellee,* v. FLORENCE COUNTY SCHOOL DISTRICT FOUR, ERNEST K. NICHOLSON, Superintendent, in his official capacity; SCHOOL BOARD MEMBERS; BENNIE ANDERSON, CHAIRMAN; MONROE FRIDAY; JACK ODOM; ELRITA BACOTE; T.R. GREEN; JAMES W. HICKS, in their official capacity, *Defendants-Appellants.*	No. 91-1047

Appeal from the United States District Court
for the District of South Carolina, at Florence.
C. Weston Houck, District Judge.
(CA-86-2028-2)

Argued: September 30, 1991

Decided: November 26, 1991

Before POWELL, Associate Justice (Retired), United States Supreme Court, sitting by designation, WILKINSON, Circuit Judge, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Justice Powell and Judge Michael joined.

COUNSEL

ARGUED: Bruce Edward Davis, Camden, South Carolina, for Appellants. Peter W. D. Wright, Richmond, Virginia, for Appellee. ON BRIEF: David R. Burlington, SOUTH CAROLINA PROTECTION AND ADVOCACY SYSTEM FOR THE HANDICAPPED, INC., Greenville, South Carolina, for Appellee.

OPINION

WILKINSON, Circuit Judge:

The Individuals with Disabilities Education Act (formerly the Education of the Handicapped Act), 20 U.S.C. § 1400 *et seq.*, requires states that receive federal funds for education of the handicapped to provide such children with a "free appropriate public education." 20 U.S.C. § 1412(1) (1988). In *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), the

Supreme Court held that parents who believe that the education offered by the public schools is inappropriate may unilaterally place their child in a private school and are entitled to reimbursement from the state for tuition and expenses if it is subsequently determined that the public school system failed to comply with its statutory duties and that the private school provided an appropriate education. The question in this case is whether reimbursement under the Act is barred when parents have enrolled their disabled child in a private school that has not been approved by the state for the child's placement under the Act. We hold that placement in a private school not approved by the state is not a bar to reimbursement under the Act and therefore affirm the judgment of the district court ordering reimbursement.

I.

This case involves the education of Shannon Carter, who is now twenty-two years old. Shannon attended the first grade at Timmonsville Elementary School of Florence County School District Four, in which she resided with her parents. Shannon attended a nearby private school, the Roy Hudgens Academy, through grade six. She re-entered the public school system for the seventh grade during the 1982-83 school year.

Shannon performed poorly in school during the seventh grade. As a result, the school system tested her twice in early 1983 for potential learning disabilities. It concluded that, although Shannon scored slightly below average in achievement, she was not learning disabled. After Shannon performed badly during the first semester

of the ninth grade, her parents prompted the school district to conduct additional testing in April 1985. Based on this testing, the school psychologist concluded that Shannon was indeed learning disabled under the criteria set forth by the South Carolina State Department of Education (SDE). Although the disability went unnoticed by the school district for almost three years, the district court found that it was comparatively severe.

Following the April 1985 evaluation, the school district proposed an individualized education program (IEP) for Shannon at a meeting on May 1, 1985.[1] Under the school district's proposal, Shannon would have remained in regular classes but would have spent at least two periods per day in the resource room. Shannon's parents objected to the proposed resource room placement, believing that it would be inappropriate to place Shannon alongside students with emotional illnesses and mental retardation. Instead her parents requested a learning disabilities itinerant program in which Shannon would received individualized attention from a special education teacher. The adopted IEP,

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[1]An IEP is a plan jointly developed by school officials and parents that contains, *inter alia*, an evaluation of the current levels of educational performance of the student, annual goals for educational advancement, a statement of the specific educational services that the school will provide the student, and objective criteria and evaluation procedures by which to measure whether the annual objectives are being achieved. *See* 20 U.S.C.A. § 1401(20) (West Supp. 1991). The IEP is "the centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe*, 484 U.S. 305, 311 (1988). The Act requires that a school establish an IEP for each disabled child and review it at least annually. *See* 20 U.S.C.A. § 1414(a)(5) (West Supp. 1991).

which became effective May 2, 1985, and was to run through June 1986, placed Shannon in an itinerant program for three periods per week of individualized instruction, with the remainder of the week in regular classes. The IEP also contained specific goals for Shannon's educational progress. It set a goal of four months of reading progress during the school year, from a level of 5.4 (*i.e.*, fifth grade, fourth month) to one of 5.8. The mathematics goal also posited four months' progress, from a 6.4 level to a 6.8 level. The IEP was implemented for the month remaining in the 1984-85 school year.

Dissatisfied with the IEP, Shannon's parents requested a due process hearing to challenge the appropriateness of the school district's educational program. *See* 20 U.S.C. § 1415(b)(2) (1988); 34 C.F.R. § 300.506(a) (1991). Both the local education agency hearing officer and the state educational agency hearing officer rejected the arguments of Shannon's parents and concluded that the IEP provided Shannon with a free appropriate public education.

Because of their dissatisfaction with the school district's IEP, Shannon's parents placed her for the 1985-86 school year at the Trident Academy, in Mt. Pleasant, South Carolina, where she remained until graduation in 1988. Trident is a private school that enrolls only children with learning disabilities and specializes in the education of those whose learning disabilities are severe. Although Trident is accredited by the Southern Association of Colleges and Schools, approval of Shannon's placement at Trident had never been sought from the State Department of Education. On previous occasions, however, Trident's enrollment included

students sent there by public schools under the aegis of the Act, including three who were placed there by South Carolina public schools. There is no evidence that Trident Academy had ever been disapproved for placements under the Act by the SDE.

In July 1986, Shannon's parents filed suit on her behalf in the United States District Court for the District of South Carolina. The complaint alleged that the school district breached its statutory duty to provide Shannon a free appropriate public education and sought actual damages and "retroactive reimbursement for tuition costs so far incurred." After a bench trial, the district court found for Shannon. Although concluding that the school district had not breached the procedural requirements of the Act, it held that the school district violated the Act's substantive provisions by failing to provide Shannon with a free appropriate public education. The court concluded that the IEP's goals of a mere four months' progress in mathematics and reading allowed Shannon to "continue to fall behind her classmates at an alarming rate" and therefore "ensured the program's inadequacy from its inception." The district court also found itinerant study of only three periods per week inadequate to "allow her to receive passing marks and advance from grade to grade."

Turning to the question of reimbursement, the district court held that "Trident Academy provided Shannon an excellent education in substantial compliance with all the substantive requirements of the [Act]." The court relied on the testimony of a court-appointed expert who tested Shannon and concluded that she made significant progress at Trident. For example, Shannon's reading comprehensive advanced

from a level of 4.7 in 1985 to 7.8 in 1988 -- more than three years' progress over three school years. Moreover, the court concluded that "[n]othing in the existing law or regulations" barred reimbursement simply because the State Department of Education had not approved Shannon's placement by her parents at the Trident Academy. Thus, the district court ordered the school district to reimburse Shannon for tuition and fees, room and board, mileage to school, and four trips home per year for each of three years at Trident, which totalled $35,716.11 plus prejudgment interest.

The school district has appealed.

II.

The school district first challenges the district court's conclusion that it failed to provide Shannon a free appropriate public education. In order to satisfy the Act's requirement that the state provide a free appropriate public education, the IEP must be "reasonably calculated to enable the child to receive educational benefits." *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). In particular, "[w]hen the handicapped child is being educated in the regular classrooms of a public school system" -- as Shannon was here -- "the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit." *Id.* at 207 n. 28. And as this court has noted, "[c]learly, Congress did not intend that a school system could discharge its duty under the [Act] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*,

774 F.2d 629, 636 (4th Cir. 1985). *See also Board of Educ. v. Diamond*, 808 F.2d 987, 991 (3d Cir. 1986).

In light of these principles, we cannot say that the district court's conclusion was clearly erroneous. The school district drafted the IEP to apply to a learning disabled tenth-grade student whose reading and mathematics skills were at a fifth and sixth grade level, respectively. Although the amount of appropriate advancement will necessarily vary depending on the abilities of individual students, *see In re Conklin*, No. 89-2220(L), slip op. at 18-19 (4th Cir. Oct. 4, 1991), the district court did not err in finding that a goal of four months' progress over a period of more than one year was rather modest for a student such as Shannon and was unlikely to permit her to advance from grade to grade with passing marks. Thus, it was proper for the district court to conclude that the itinerant program failed to satisfy the Act's requirement of more than minimal or trivial progress.

The school district suggests that the Act's preference for "mainstreaming" handicapped students, *see* 20 U.S.C.A. § 1412(5)(B) (West Supp. 1991); 34 C.F.R. §§ 300.550-300.556 (1991), justifies its IEP and makes the public school placement superior to Trident, which educates only children with disabilities. The Act's mainstreaming policy, however, is of no avail to the school district here. Under the Act, mainstreaming is a policy to be pursued so long as it is consistent with the Act's primary goal of providing disabled students with an appropriate education. Where necessary for educational reasons, mainstreaming assumes a subordinate role in formulating an educational program. *See Rowley*, 458 U.S. at 181 & n. 4; *Daniel R.R. v. State Bd. of Educ.*, 874

F.2d 1036, 1044-45 (5th Cir. 1989). In any event, the Act's preference for mainstreaming was aimed at preventing *schools* from segregating handicapped students from the general student body, *see Burlington*, 471 U.S. at 373; H.R. Rep. No. 332, 94th Cong., 1st Sess. 2 (1975); the school district has presented no evidence that the policy was meant to restrict *parental* options when the public schools fail to comply with the requirements of the Act.

Likewise, that Shannon's parents rejected the school district's proposed resource room placement in favor of the less intensive itinerant program does not relieve the school district of liability here. There was no finding by the district court that the alternative rejected by Shannon's parents would have provided an appropriate education. In the absence of such a finding, it is conceivable that the resource room placement would have been *less* appropriate than the IEP upon which the parties eventually settled. Thus, the case in which parents reject a plainly appropriate IEP is simply not before us.

III.

The school district next argues that the Act does not permit reimbursement when parents unilaterally withdraw their child from the public school system and enroll him or her in a private school that has not been approved by the state for the child's placement under

the Act. For the reasons explained below, we must reject this contention.[2]

A.

We begin with a brief review of the law governing reimbursement for private school education under the Individuals with Disabilities Education Act. The Act itself does not explicitly authorize the reimbursement of parents for expenses incurred when they unilaterally place their child in a private school out of a belief that the education offered by the public schools is not "appropriate." The Act's language does, however, direct a court to "grant such relief as [it] determines is appropriate." 20 U.S.C. § 1415(e)(2) (1988). In *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359 (1985), the Supreme Court held that Congress intended this remedial provision to authorize a court to order reimbursement when the court concludes both that the public school system failed to provide a free appropriate public education and that the private school chosen by the parents did provide an appropriate education to the child. *See id.* at 369-70. Because administrative and judicial review of a school system's program under the Act is "ponderous," parents who believe that the public schools are not offering their child an appropriate education are faced with a choice:

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[2]The school district does not dispute the district court's conclusion that Trident Academy provided Shannon with an appropriate education, which is a prerequisite to reimbursement under *Burlington*. *See* 471 U.S. at 370. Nor does the school district challenge the amount of reimbursement ordered by the district court.

> [G]o along with the IEP to the detriment of their child if it turns our to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course, . . . it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not . . . be reimbursed by the school officials.

Id. at 370. Such a result, according to the Court, would leave "the child's right to a *free* appropriate public education . . . less than complete. *Id.* (emphasis in the original).

B.

In *Burlington*, the state's department of education had approved the parents' private school placement. *See id.* at 363. Here, by contrast, neither Shannon's parents nor the school district sought state approval for Shannon's placement at Trident, and therefore such state approval was never given. The school district argues that the latter fact by itself bars reimbursement under the Act. Moreover, the school district suggests that a placement at Trident would not have been approved even had an application been presented to the SDE. First, although its educational program in many ways parallels what is required under the Act, Trident does not attempt to comply with the terms of the Act. Trident does not, for example, develop educations plans called IEPs, though it does set goals for students and revise them four times per school year. Second, at the time of trial there were at least two faculty members at Trident -- including one of Shannon's teachers -- who were not certified by the state. Under state law, these

teachers are prohibited from teaching in a South Carolina public school. *See* S.C. Code §§ 59-21-550, 59-25-20 (1990); S.C. Code Regs. 43-205 (1982).

We do not think that these facts are fatal to the request for reimbursement. In suggesting that reimbursement is proper only when parents place their child in a private school approved by the state, the school district misreads the statute. The pertinent provision of the Act requires that states:

> [S]et forth policies and procedures to assure . . . that--
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> (i) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, *if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency* as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State; and
>
> (ii) *in all such instances*, the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies . . . .

20 U.S.C.A. § 1413(a)(4)(B) (West 1990 & Supp. 1991) (emphasis added).

As indicated by the italicized passages, Congress clearly envisioned that § 1413(a)(4)(B), and its requirement that private schools receiving funds under the Act meet state educational standards, would apply only when the child is placed in the private school by the state or local school system. The Act itself simply imposes no requirement that the private school be approved by the state in parent-placement reimbursement cases. there is no indication to the contrary in the Act's legislative history, *see, e.g.*, S. Rep. No. 168, 94th Cong. 1st Sess. 32, 50, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1425, 1456, 1473, and federal regulations and South Carolina law similarly apply state educational standards to private schools only when the child is placed there by the state or the school district. *See* 34 C.F.R. §§ 300.400-300.403 (1991) (state educational standards apply to "a handicapped child who is placed in or referred to a private school or facility by a public agency"); *id.* § 300.347 (state responsibility for IEPs when "a public agency places a handicapped child in, or refers a child to, a private school or facility"); S.C. Code § 59-33-50 (1990) ("When a school district cannot . . . provid[e] for the education of its resident handicapped children because of insufficient numbers, the district may contract with other districts within the State or school systems or public or private institutions or agencies within or without the State which maintain approved special educational facilities. . . ."); S.C. Code Regs. 43-243(E)(7) (1982) ("Whenever handicapped children are placed in private schools by the SEA/LEA [state or local educational agency], such private schools

must be in compliance with the standards of the SEA/LEA").

We agree with the district court that *Schimmel ex rel. Schimmel v. Spillane*, 819 F.2d 477 (4th Cir. 1987), on which the school district relies, is not to the contrary. In *Schimmel*, the parents never demonstrated that the private school placement proposed by the state would not have offered an appropriate education; thus, the state placement provided the child everything to which he was entitled under the Act and the parents' claim for reimbursement for an out-of-state private placement was properly denied. *See Goodall ex rel. Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363, 367-69 (4th Cir. 1991); *Hessler ex rel. Britt v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983). Here, by contrast, the district court held that the placement proposed by the state was not appropriate. Although the *Schimmel* court did note that "[t]he statute simply does not permit *school systems to place* and fund handicapped children in unapproved private schools," 819 F.2d at 484 (emphasis added), this language states only the unremarkable proposition that the *public schools* may not place a child in a private school that has not been approved by the state. *See, e.g., Antkowiak ex rel. Antkowiak v. Ambach*, 838 F.2d 635, 639-40 (2d Cir. 1988). *Schimmel* did not present the situation where, as here, the placement offered by the public schools is inappropriate under the Act and the parents are forced by the school system's violation of the

Act to unilaterally withdraw the child from the public schools and, on their own, seek alternative schooling.[3]

We recognize that courts have differed on the question presented here. Several courts have allowed reimbursement despite the absence of state approval of the private school chosen by the parents. *See Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1160-61 (5th Cir. 1986); *Carrington v. Commissioner of Educ.*, 404 Mass. 290, 294-96, 535 N.E.2d 212, 215-16 (1989). By contrast, in *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563 (2d Cir. 1989), the Second Circuit concluded that parents may not obtain reimbursement for unilateral placements in unapproved private schools. The court based its reasoning on the Supreme Court's statement in *Burlington* that reimbursement is appropriate only "if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." 471 U.S. at 369, 105 S.Ct. at 2002. Because the Act defines the term

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[3]For similar reasons, we find *In re Co... , supra,*, to be inapposite. In *Conklin*, the district court held that the educational program offered by the state, through the State Board of Education hearing review panel, provided a free appropriate public education under the Act -- and, indeed, offered *more* than the Act required. *See*, slip op. at 10-11, 16. Thus, as in *Schimmel*, the state satisfied its statutory obligations and the claim for reimbursement was therefore properly denied. Although in *Conklin* there is language that would decline to hold a state accountable for an unapproved private placement, *see id.* at 10 n.5, the court simply was not presented with, and did not purport to address, the statutory and precedential arguments that arise when a district court finds both that the state has defaulted on its obligations under the Act and that the private school chosen by the parents provides an appropriate education.

"free appropriate public education" to mean, *inter alia*, "special education and related services that . . . meet the standards of the State educational agency," 20 U.S.C. § 1401(a)(18)(B) (1988), the *Tucker* court concluded that a private school placement cannot be "proper under the Act," even if made by parents rather than public school officials, when the private school in question does not "meet the standards of the State educational agency." *Tucker*, 873 F.2d at 568.

We must respectfully decline to follow the *Tucker* decision. First, in relying on a general definition for its holding, *Tucker* did not address the specific language in 20 U.S.C. § 1413(a)(4)(B)(ii), which by its terms applies state educational standards only when a child is placed in a private school by public school officials. That language was intended by Congress to protect the interests of handicapped children placed in private schools by the state. Had Congress intended to take the very different step of limiting the appropriate relief due handicapped children when their parents choose a private school, there would have been no reason for Congress to have limited § 1413(a)(4)(B)(ii) by its terms to placements by the state. The *Tucker* court, by focusing only on a general definition, thus appears to have created a significant and unwarranted restriction upon the ability of otherwise eligible children to seek relief.

Second, we do not believe that the Supreme Court, by requiring that the private school placement be "proper under the Act," intended to impose on private schools chosen by parents the whole panoply of duties that the Act imposes on the state. Rather, when a public school system has defaulted on its obligations

under the Act, a private school placement is "proper under the Act" if the education provided by the private school is "reasonably calculated to enable the child to receive educational benefits," *Rowley* 458 U.S. at 207 -- the same standard by which the appropriateness of a public school's IEP is assessed. *See Tice ex rel. Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1208 (4th Cir. 1990) (standard is whether private placement "was proper to meet the Act's educational goals").

In sum, we do not believe that the Act as written forbids reimbursement when parents place their child in a private school that has not been approved by the state, and we join those courts that have so held. As interpreted by *Burlington*, the Act imposes only two prerequisites to reimbursement: that the program proposed by the state failed to provide the child a free appropriate public education, and that the private school in which the child is enrolled succeeded in providing an appropriate education, *i.e.*, an education that is reasonably calculated to enable the child to receive educational benefits.

C.

Conditioning reimbursement under *Burlington* on state approval of the private school would undermine the values and policies the Act was enacted to further. "The Act represents an ambitious federal effort to promote the education of handicapped children. . . ." *Rowley*, 458 U.S. at 179. Congress sought to promote this goal by conditioning the receipt of federal funds on the implementation of state programs designed to ensure that disabled children are provided with educational

opportunities, including special education and related services, that are tailored specifically to meet their unique needs. *See* 20 U.S.C.A. § 1400(c) (West Supp. 1991). Because Congress intended that the Act "result in maximum benefits to handicapped children and their families," S. Rep. No. 168, 94th Cong., 1st Sess. 6, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1425, 1430, the Act's remedial provision -- which authorizes the district court to "grant such relief as [it] determines is appropriate," 20 U.S.C. § 1415(e)(2) (1988) -- is "a board grant of equitable power designed to provide courts maximum flexibility in effectuating the statutory objectives." *Doe v. Brookline Sch. Comm*, 722 F.2d 910, 919 (1st Cir. 1983).

The Act envisions, of course, that the primary providers of educational opportunities for handicapped children will be the public schools. When those schools fail to meet their responsibilities, however, parents may be left to their own devices in finding a school that provides the specialized educational environment necessary to educate their children. In such circumstances, it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place.

Finally, it must be emphasized that parents who unilaterally place their child in an unapproved private school bear substantial risks -- risks that function to ensure that our decision will not be a means through which parents can subvert the Act's emphasis on public education. If the court finds that the public schools did

in fact provide a free appropriate public education, the parents cannot receive reimbursement, whether or not the private school in question is state approved. *See, e.g., Goodall*, 930 F.2d at 367-69. Further, reimbursement is barred if the court finds that the private school chosen by the parents failed to provide an appropriate education. *See, e.g., Tice*, 908 F.2d at 1207-08 & n. 11. It may be that the possibility of the latter is enhanced when the private school in which the child is enrolled is not approved by the state. In the absence of a statutory command that the choice of an unapproved private school is not the parents' to make, however, that risk is simply one factor that the parents must consider in deciding where to education their child.

IV.

We in no way disparage the process through which states impose standards upon public schools and certify teachers as qualified to teach in particular subject areas. Such state regulatory mechanisms play a positive and important role in ensuring educational quality. Thus, when parents unilaterally place their child in a private school that has not been approved by the state, they invariably bear some risk that the school will fail to provide an adequate education. Nonetheless, we simply cannot convert state approval of a parent's private school placement of a handicapped child into a condition for reimbursement under *Burlington* when that private school meets the needs of the child in the manner contemplated by the Act and when the state has defaulted on its statutory obligations.

The judgment of the district court is hereby AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA -
FLORENCE DIVISION

SHANNON CARTER, a minor by and through her father and next friend, EMORY D. CARTER,	)	
Plaintiff	)	
vs.	)	
FLORENCE COUNTY SCHOOL DISTRICT FOUR: ERNEST K. NICHOLSON Superintendent, in his official Capacity; SCHOOL BOARD MEMBERS: BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM, ELRITA BACOTE, T. R. GREEN, and JAMES W. HICKS, in their official capacities,	)	CIVIL ACTION NO. 4:86-2028-2
Defendants.	)	

This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff shall have judgment against the defendant in the

amount of Thirty Five Thousand Seven Hundred Sixteen and 11/100 Dollars ($35,716.11) with prejudgment interest to run at the rate of 7.91% per annum from December 31, 1989 through December 31, 1990 and prejudgment interest at the rate of 6.62% per annum to run from January 1, 1991 through January 31, 1991 with postjudgment interest thereon at a rate of 6.62% as provided by law, plus her costs of action and this action is hereby dismissed.

February 6, 1991
Date

ANN A. BIRCH
Clerk

/s/ Tish Singletary
(By) Deputy Clerk,
Tish Singletary

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

SHANNON CARTER, a minor by and through her father and next friend, EMORY D. CARTER, Plaintiff, v. FLORENCE COUNTY SCHOOL DISTRICT FOUR; ERNEST K. NICHOLSON, Superintendent, in his official capacity; SCHOOL BOARD MEMBERS: BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM, ELRITA BACOTE, T. R. GREEN, and JAMES W. HICKS, in their official capacities, Defendants.	) Civil Action No. 4:86-2028-2)))

2. At the beginning of the 1982-1983 school year, Shannon reentered public school in Timmonsville and was enrolled in the seventh grade.

3. At some time in the early part of 1983, Shannon was given some screening tests by the junior high school guidance counsellor to obtain an indication of her I.Q. and achievement level. In February 1983, the guidance counsellor contacted the school district's educational evaluator, Mr. Ray Hill, to conduct similar tests. Mr. Hill testified that he administered one intelligence and one achievement test to Shannon in February 1983. According to Hill, Shannon scored slightly below average achievement and, thus, did not qualify as learning disabled.[2]

4. In the fall of 1984 Shannon entered the ninth grade at Timmonsville High School and was placed in a regular classroom. Shannon continued to perform poorly as reflected by her first semester averages.[3] This continued poor performance prompted Shannon's parents to seek additional testing for her. In February 1985, Mrs. Carter contacted the school district to request another evaluation.

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[2]The actual test results were not available at trial. Hill stated that after a thorough search of his files he was unable to locate Shannon's 1983 test results. This is most unfortunate because all of the experts who testified on the subject were in agreement that, absent a traumatic injury to the head, a learning disability does not naturally develop in a child who previously did not suffer from one.

[3]Shannon's first semester averages were as follows: English 9 - D; Pre-Algebra - F; Physical Science - D; Civics and Geography - F; and Physical Education - F.

5. On April 13, 1985, Shannon was again tested by Mr. Ken Bailey, a state certified school psychologist. Following the evaluation it was agreed that a meeting would be held to discuss its results. At the meeting held on April 18, 1985, Bailey reported Shannon's evaluation results concluded that, based on State Department of Education criteria, Shannon qualified for a learning disability (LD) placement. He explained that there existed "a significant discrepancy between ability and achievement according to the one and one-half standard deviation difference formula. . . ."[4] This evaluation indicates a serious learning disability, with a variance between Shannon's verbal I.Q. and performance I.Q. of 36 points.[5] Various subtests administered by Bailey yielded reading ability levels from 4.7 grade level equivalency to a 6.8 level.

6. Shannon suffers from a serious and significant learning disability. Testimony from Dr. James Ward and Dr. Allison Grant indicate that Shannon's learning disability is on the severe end of the scale. According to Shannon's parents and Dr. Grant, Shannon also suffered from significant emotional overlay manifested by depression, feelings of low self-worth and self-esteem, as well as suicidal thoughts. Testimony from Ms. Margaret Mitchell of Trident Academy indicates that Shannon entered Trident Academy in the fall term of 1985 as a functional illiterate.

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[4]Report of Dr. Bailey, plaintiff's exhibit 3.

[5]The verbal I.Q. was 81 and the performance I.Q. was 117.

7. Subsequent to the evaluation performed by Bailey, an IEP meeting was scheduled for May 1, 1985. Numerous personnel from Florence County School District Four were present as well as the parents of Shannon and Ms. Linda Summer.[6] During that meeting, the IEP proffered by the district was read to the Carters. The school district was of the opinion that an L.D. resource class would be the appropriate placement for Shannon. The parents disagreed and requested an L.D. itinerant program.[7] According to the parents' testimony, their reasoning was that it would be inappropriate for Shannon to be in a resource class with other special education students with emotional illnesses and/or mental retardation. Lisa Free, the L.D. teacher at Timmonsville High School, testified that the majority of her students that year were mentally retarded and that segregation between these students and her L.D. students was improbable.

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[6]Ms. Summer is a psychiatric social worker from Florence, South Carolina. She was employed by the plaintiff's parents and first examined the plaintiff on February 19, 1985. She testified in the administrative phase of this proceeding and was present during the trial in this court but did not testify.

[7]Pursuant to 20 U.S.C. § 1412 the South Carolina State Board of Education adopted Regulations 43-243 which at page 144 explained the difference between an itinerant program and a resource class as follows: In an itinerant program the specialist will provide continual ongoing services to handicapped pupils and teachers taught in regular classroom settings. A resource room program shall involve pupils who will remain in regular classrooms for the major part of the day and will be scheduled into the resource room for one or more periods of individualized instruction contingent on pupil's needs.

8. Despite the disagreements that existed between Shannon's parents and the school district, the IEP document was nonetheless prepared and submitted to the Carters for signature.[8] Implementation of the plan commenced on May 2, 1985, and by its clear language was to run until June 1986.[9] Shannon's ultimate placement under this IEP was three periods of L.D. itinerant classes per week. A period in district four is a little less than one hour.

9. Several long range goals were written into the IEP. The reading goal specified four months of progress during the year, from a 5.4 level to a 5.8 level. The mathematics goals was similarly one for four month's progress, from a 6.4 level to a 6.8 level. In light of the expert testimony of Ms. Mitchell, Dr. Grant and Dr. Ward, it is clear that these goals were wholly inadequate. Much more progress was necessary in order to provide Shannon an appropriate education. Shannon was in need of an intensive self-contained L.D. environment to afford her with an individualized special education to meet her unique needs.

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[8]There was considerable dispute during the trial as to whether the parents signed the document knowingly and voluntarily. This issue is of no import; clearly the Carters were not satisfied with the plan. The IEP is not a binding contract and either party can seek changes at any time. The fact that their signature appears on the document does not effect the outcome of this case to any extent whatsoever.

[9]The school district would have this court believe that the IEP was only intended for the remainder of the school year. However, the IEP states in clear and unambiguous language that it was to run until June 1986.

10. Shannon's parents were ultimately dissatisfied with the district's plan and sought a due process hearing pursuant to 34 CFR § 300.506(a). The hearing was held on August 20, 1985, in Timmonsville, South Carolina. In a decision dated September 5, 1985, the hearing officer held for the district. The Carters appealed this decision to the state level. The hearing officer's decision was upheld on October 14, 1985.

11. In response to their dissatisfaction with the IEP Shannon's parents began a search for an appropriate placement for Shannon. Ultimately, they selected Trident Academy in Mt. Pleasant, South Carolina. Trident Academy is a private day school specializing in the education of learning disabled children. Shannon began courses at Trident in September 1985, and remained there until her graduation in the spring of 1988.

12. Trident Academy is fully accredited by the Southern Association of Colleges and Schools and has accepted public school students under the dictates of the EAHCA on numerous occasions, including at least three instances from South Carolina public schools. In these instances, EAHCA tuition monies were paid directly from the school districts to Trident. The district has offered no evidence that Trident has ever been disapproved by the South Carolina Department of Education.[10]

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[10]Although Dr. Black testified in the abstract about possible disapproval of the school because it employs one non-certified teacher, this is not fatal to the plaintiff's case.

13. In light of conflicting testimony as to the appropriateness of Trident, the court's appointed expert, Dr. Richard Nagle, tested Shannon in the spring of 1988. His tests revealed that Shannon made significant progress at Trident. Her reading comprehension had risen from a level of 4.7 in 1985 to 7.8 in 1988. Based on these tests, Dr. Nagle concluded that Trident had done a good job of meeting the individualized needs of Shannon. The court agrees with Dr. Nagle's assessment as well as the assessments of Dr. Ritter, Dr. Ward, Dr. Grant and Ms. Mitchell that the education offered at Trident Academy has been an appropriate special education for Shannon.

14. As a result of enrolling Shannon at Trident Academy, the Carters incurred the following expenses:

	85-86 School Year	86-87 School Year
Tuition and fees	$ 6,992.00	$ 8,484.00
Room and Board	3,600.00	3,600.00
Milage to school	158.40	158.40
4 trips home	221.76	221.76
	$10,972.16	$12,464.16

87-88 School Year

Tuition and fees	$ 8,139.70
Room and board	1,869.69
Milage to school	2,059.20
4 trips home	211.20
	$12,279.79

15. The court finds that the tuition and fees charged by Trident were reasonable for the services it provided. The court is persuaded by the fact that Trident offers these services on the open market and that the economics of supply and demand are in operation. Further, the defendant has offered no evidence that Shannon could have received the special educational services provided by Trident at any facility closer to her home or at a lower cost.[11] Therefore, the Carters are entitled to reimbursement for tuition and fees in the amount of $23,615.70, for the three school years that Shannon attended Trident.

16. For the 1985-86 and 1986-87 school years, Shannon boarded with a Mt. Pleasant resident, Ms. Mary Ann Griffin. During the 1987-88 school year, Shannon roomed in a private apartment with her older brother in the Charleston area. Since Timmonsville and Trident Academy are a considerable distance from one another, it was reasonable for Shannon to board somewhere in the area of Trident. The room and board expense of $9,069.69 was a logical and legitimate consequence of Shannon's attending a school away from her home. We find that said amount is a reasonable additional expense necessitated by Shannon attending an out of town school.

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[11]There was some suggestion that Shannon could have received special education services at Florence School District One. However, there was no evidence that the defendant ever presented this as an option. The parents were, of course, prevented by state law from independently seeking a placement for Shannon in any public school outside of her district.

17. During the 1985-86 and 1986-87 school years Shannon traveled approximately 20 miles per week to attend Trident Academy at a cost each year of $158.40. This expense increased to 52 miles per day and a total of $2,059.20 during the school year 1987-88. The court finds these milage expenses for Shannon's transportation to and from school to be reasonable and recoverable.[12] Therefore, the Carters are entitled to a total of $2376.00 for Shannon's transportation to and from school.

18. The four trips home each year were a reasonable and necessary expense and shall be allowed. Therefore, the Carters are entitled to reimbursement for those expenses in the amount of $654.72.

19. It is impossible to compute with accuracy the amount of prejudgment interest that the plaintiff is entitled to recover in this action. Her father borrowed some of the money spent for education related expenses from the Pee Dee State Bank, Timmonsville, South Carolina. The record reflects that the interest paid or obligated to be paid on that sum through December 31, 1989 is $6519.04.[13] The amount of plaintiff's expenses

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[12]The milage expenses for the school year 1987-88 are substantially greater than those for the preceding two years. In finding the same to be reasonable we have also considered the fact that room and board expenses for the same period were correspondingly lower than those for the preceding two years.

[13]Plaintiff's exhibit 36 reflects the amount of interest paid by the Carters through December 31, 1988. Plaintiff's exhibit 37 indicates the per diem interest on the loan. Since the loans were made from January 1 through December 31 of each year, interest was computed at the per diem rate through December 31, 1989.

paid from funds other than those borrowed from Pee Dee State Bank cannot be determined, and no interest can be awarded therefor. Likewise, the record is silent as to any interest paid by plaintiff's father after December 31, 1989. From that day through December 31, 1990, all sums required herein to be paid by the defendant to the plaintiff shall accrue interest at the rate of 7.91% per annum.[14] During the month of January 1991, the prejudgment interest rate shall be 6.62% per annum which is the yield of Fifty-two Week Treasury Bills during that month.

CONCLUSIONS OF LAW

A. Jurisdiction is conferred upon the court by 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3) and (4).

B. The Education of the Handicapped Act, 20 U.S.C. § 1401 *et seq*. (1976 ed. and Supp. IV), provides federal money to assist state and local agencies in educating handicapped children, and conditions such funding upon a state's compliance with extensive goals and procedures. The EHA represents an ambitious federal effort to promote the education of handicapped children and was passed in response to Congress's perception that a majority of handicapped children in the United States "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when

[14]Fifty-two Week Treasury Bills are sold by auction on a monthly basis. Records of those sales are maintained in the office of the clerk of this court, and the 7.91% rate is an average of the monthly yields of said bills during 1990 as computed from those records.

they were old enough to 'drop out.'" H. R. Rep. No. 94-332, p. 2 (1975).

C. The "free appropriate public education" required by the EHA is tailored to the unique needs of the handicapped child by means of an individualized educational program. § 1401(18). The IEP, which is prepared at a meeting between a qualified representative of the local educational agency, the child's teacher, and the child's parents consists of a written document containing,

> (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, includ-ing short-term, instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to partici-pate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved. § 1401(19).

D. In the leading case on the subject, *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176 (1981), the Supreme Court has held that the requirement that the state provide a handicapped child with a "free appropriate public education" is met by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be

provided at public expense, must meet the state's educational standards, must approximate the grade levels used in the state's regular education, and must comport with the child's IEP. In addition, the IEP, and, therefore, the personalized instruction should be formulated in accordance with the requirements of the EHA and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Rowley*, at 204-205.

E. The EHA permits "[a]ny party aggrieved by the findings and decision" of the State administrative hearings "to bring a civil action" in "any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." § 1415(e)(2). When a suit is brought under the EHA, the court's inquiry is twofold. First, has the state complied with the procedures set forth in the EHA? And second, is the individualized educational program developed through the EHA's procedures reasonably calculated to enable the child to receive educational benefits?

F. In the present case the plaintiff contends that the school district's behavior was afflicted with "serious procedural infirmity" regarding compliance with the elaborate procedural requirements of the EHA, thereby invalidating the May 1, 1985, IEP. Such compliance is critical to the efficient operation of the EHA, and serious procedural noncompliance can by itself support a finding that the child has not been provided with a FAPE. *Hudson by and through Tyree v. Wilson*, 828 F.2d 1059 (4th Cir. 1987), citing *Hall v. Vance County Board*

of Education, 774 F.2d 629, 635 (4th Cir. 1985). The Carters contend that they were confronted at the May 1, 1985, IEP meeting with a completed IEP as if it were a *fait accompli*, with no opportunity to contribute to the content or development of the document.

G. It has been held "appropriate for agency staff to come prepared with evaluation findings, statements of present levels of educational performance, and a recommendation regarding annual goals, short term instructional objectives, and the kind of special education and related services to be provided. However, the agency must make it clear to the parents at the outset of the meeting that the services proposed by the agency are only recommendations for review and discussion with the parents." *B.G by F.G. v. Cranford Board of Education*, 702 F.Supp. 1158, 1165 (D.N.J. 1988). While there is considerable dispute as to what actually took place at the meeting, the court concludes that there has been no serious procedural non-compliance on the part of the school district.

H. Turning now to the court's second inquiry, it should be noted that there exists no single substantive standard describing exactly how much educational benefit is sufficient to satisfy the EHA. Each case must be determined on a case-by-case basis, *Hall v. Vance County Board of Education*, 774 F.2d 629, 635 (4th Cir. 1985), but, as the *Rowley* decision makes clear, "[w]hen the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit." *Rowley*, at 207, N. 28.

I. The IEP prepared on May 1, 1985, did not provide Shannon with a free appropriate public education as required by the EHA. Even if all of the goals of the document had been met, Shannon would continue to fall behind her classmates at an alarming rate. The stated progress of only four months in her reading and math skills over an entire school year ensured the program's inadequacy from its inception. Furthermore, the district's offer of only three periods of itinerant study a week failed to meet Shannon's educational needs. At a minimum, which is all the EHA requires, the district was obligated to provide Shannon an individualized program that would allow her to receive passing marks and advance from grade to grade. Having failed to do this, the court concludes that Florence County School District Four failed to provide Shannon Carter with a free appropriate public education.

J. It is now settled that parents may be entitled to tuition reimbursement despite the unilateral withdrawal of their child from the public school. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). The parents, of course, withdraw the child at the risk that the subsequent administrative and judicial review will establish that the contested placement provided a FAPE. In *Burlington* the court noted the cruel dilemma an arguably inappropriate placement offers the parents if they have no possibility of reimbursement for expenses resulting from an unilateral withdrawal. They may either leave the child in an inappropriate classroom pending the long process of review or remove the child and waive any right to tuition reimbursement for alternative schooling while review is taking place. The court accordingly held that a prior unilateral withdrawal did not waive the child's right to

such an equitable remedy at the end of the review process. *Burlington*, at 370.

K. There appears no doubt, then, that the Carters were entitled to withdraw their child from the public school because of its failure to provide a FAPE. The remaining issue concerns whether or not the Carters had a right to place Shannon at Trident Academy. From the outset it should be noted that the evidence established that Trident Academy provided Shannon an excellent education in substantial compliance with all the substantive requirements of the EHA. Although it did not comply with all of the procedures outlined in the EHA, it evaluated Shannon quarterly, not yearly as mandated in the EHA, it provided Shannon with low teacher-student ratios, and it developed a plan which allowed Shannon to receive passing marks and progress from grade to grade. The court concludes that Shannon received an appropriate education, within the meaning of the EHA, at Trident Academy.

L. The defendants, relying on the recent case of *Schimmel by Schimmel v. Spillane*, 819 F.2d 477 (4th Cir. 1987), argue that the plaintiff herein is not entitled to tuition reimbursement because they placed her in school that had not been approved by the South Carolina State Department of Education. *Spillane* is clearly distinguishable from the present case. In *Spillane*, the parents and the school were in agreement that the child needed to be placed in a residential school, and the school system agreed to pay the cost of such placement at the Little Keswick School near Charlottesville, Virginia. Little Keswick is a private residential school which is approved by the Virginia Department of Education as a school for the handicapped. The

parents declined to enroll their child at Little Keswick and instead enrolled him at a private school in Vermont. After the school refused to place the child at the Vermont School, the parents sought a due process hearing. At that hearing it was held that the Virginia school offered an appropriate education. This decision was upheld on appeal to the state reviewing officer. The parents then brought suit in the district court where judgment was entered for the school district. The Fourth Circuit Court of Appeals affirmed. *Schimmel by Schimmel v. Spillane*, 819 F.2d 477 (4th Cir. 1987). This court has no quarrel with the *Schimmel* decision and agrees with the same.

In the instant case the situation is quite different. We are not dealing with referral to a private school with a public agency so as to make § 1413 (a)(4)(B) of the EHA and 34 CFR § 300.401(a)(3) applicable. This case involves a situation where the school district failed to provide the child with a free appropriate public education, and the only way the parents could provide the same to their daughter within a meaningful time frame was to enroll her in a private school. Nothing in the existing law or regulations convinces this court that the stringent requirements advanced by the defendants should be applied to such a unilateral placement.

M. Congress has provided that in all actions brought in this court under the EHA "the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court deems is appropriate." 20 U.S.C. § 1415 (e)(2)(c). The United States Supreme Court has said that "equitable considerations are

relevant" in determining the appropriate relief mandated by the statute. This court, therefore, concludes that the plaintiff should be entitled to recover all reasonable expenses incurred by her parents in enrolling her in Trident Academy for the last three years of her high school education. These expenses should, of course, include prejudgment interest.

ORDER

The plaintiff shall, therefore, have judgment against the defendant in the amount of $35,716.11 plus prejudgment interest computed in the manner herein specified[15] and costs. AND IT IS SO ORDERED.

/s/ C. Weston Houck
C. WESTON HOUCK
UNITED STATES DISTRICT JUDGE

Florence, South Carolina
January 30, 1991

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[15]Prejudgment interest shall also be computed in accordance with 28 U.S.C. § 1961(b).

SEA IMPARTIAL REVIEW OF THE DUE PROCESS HEARING CONCERNING SHANNON ELAINE CARTER

NATURE AND PURPOSE OF THE REVIEW

The review was conducted because Mr. and Mrs. Emory Carter, the parents of Shannon Elaine Carter, appealed the decision of Heyward S. Rosemond, the Hearing Officer at the Local Educational Agency (LEA) level.

On September 20, 1985, the typed notarized proceedings and exhibits were personally received and signed for by the hearing officer.

On September 25, 1985, the Petitioner's Argument was received by the hearing officer, along with a notarized certificate of mailing attesting that a copy of same had been mailed to the attorney for the LEA.

The review was begun on September 25 and completed on October 12, 1985.

As instructed under Rules and Regulations governing P.L. 94-142 Section 121a.510 and section 121a.512, the following actions have been taken:

1. The entire hearing record of Shannon Elaine Carter and the Petitioner's Argument in the same matter have been received, studied and reflected upon.

2. According to all of the information, it appears that the procedures were consistent with the requirements of Due Process.

3. No additional evidence has been requested by the writer.

4. An independent decision based on the intensive review of and reflection upon the materials presented during the LEA Due Process Hearing in the interest of Shannon Elaine Carter is set forth as follows:

SUMMARY OF FACTS

1. Shannon Elaine Carter is a female child who will be 16 years of age on October 24, 1985. She meets the State Department of Education's criteria for the condition of a learning disability. There also appears to be some depression and anxiety co-existing with the primary condition of a learning disability.

2. That the law requires that a free appropriate public education including special education and related services be provided to all handicapped children in a manner which meets their unique needs.

3. That the hearing officer did give due consideration to the testimony of all witnesses, although one might question the credibility of psychological testing administered by one neither licensed or state certificated to do so.

4. That the Florence County School District #4, Timmonsville, South Carolina is able to provide an appropriate education for Shannon Elain Carter.

STATEMENT OF THE DECISION

The central issue at hand is the fact that the law (P.L. 94-142) and interpretative regulations and court decision speak to both the issues of appropriate education and the delivery of education in the least restrictive environment.

Clearly, the concept of least restrictive environment is violated in the extreme by removing this child from her natural family so that she might attend an institution alleged to have a better program than the public school setting. Without question, the least restrictive environment for Shannon's education to occur would be in a rescurce room for learning disabled youngster in her home school district while she lives at home with her parents.

This leads, of course, to the basic issue of an appropriate education. There is little, if any, evidence to support the alleged claim that Shannon cannot receive an appropriate education in the LEA. In fact, the issue of an appropriate education seems to be peripheral to the question of diagnosis. One is lead to question any statements that unqualifiedly attribute cause and effect relationships to events and consequent emotional states. It is most likely that Shannon's emotional state has been affected negatively by her experience in school. However, the LEA has clearly evidenced its willingness to offer counseling in addition to the resource room for learning disabled students. The school district should adhere strictly to all due process requirements should the parents of Shannon Carter decide to enroll her in the public school system again so that she might receive a free appropriate public education in the least

restrictive environment. In short, the LEA is able to provide Shannon Elaine Carter a free appropriate public education.

The decision is binding on all parties unless an appeal (civil action) is initiated within ten (10) days following the receipt of this decision by the parties involved.

/s/Richard R. Ferrante
Richard R. Ferrante, Ph.D.
10-14-85

DUE PROCESS HEARING FOR SHANNON ELAINE CARTER

A due process hearing was held August 20, 1985, 2:00 p.m., at Timmonsville Area Vocational Center. The hearing was requested by the parents of Shannon Elaine Carter.

The purpose of the hearing was to determine if Florence County School District #4 was providing an adequate academic program for Shannon Elaine Carter. More specifically, the district was accused of:

1. refusing to provide an adequate academic program

2. developing an individualized educational program (IEP) that did not meet Shannon's needs in terms of instruction

3. not having a program to deal with Shannon's learning disability.

The following is a list of parties involved in the hearing and their position/relationship to Shannon:

Emory D. Carter--Father of Shannon
Elaine Carter--Mother of Shannon
James T. McBratney Jr.--Attorney for Mr. and Mrs. Carter
Linda M. Summer--Certified Social Worker
Lucy Davis--Educator
Dr. Joe Neely--Clinical Psychologist

Ray Hill--Educational Evaluator/Florence County School District #4
Ken Bailey--School Psychologist II
Avery Nelson--Principal/Timmonsville High School
Dr. Ernest Nicholson--Superintendent/ Florence County School District #4
Dr. William Latham--School Psychologist III
Ruth Jordan--English Teacher/Timmonsville High School
Bettye Hennigan--Mathematics Teacher/ Timmonsville High School
Pamela Farmer--Spanish Teacher/ Timmonsville High School
Lisa Free--Special Education Teacher/ Timmonsville High School
Gloria Nelson--Coordinator of Programs for the Handicapped/Florence County School District #4
Bruce Davis--Legal Counsel/Florence County School District #4

The following is a listing and brief description of each written item entered as evidence in this hearing:

EXHIBIT 1--COMPLAINANT--Linda Summer

An extensive report of Shannon's background, family relationships and problems encountered in school throughout her school career.

The first evaluation session indicated that Shannon may have a learning disability. Several instruments were used to determine the nature and degree of disability.

INSTRUMENTS USED

Weschler Intelligence Scale for Children-Revised
Bender Gestalt
Wide Range Achievement Test-1946 Edition
Gray Oral Reading Test-Form C
Written Composition
Family Drawing
Moody Problem Checklist

Ms. Summer's analysis of the test data indicated to her that Shannon has the following disorders:

1. Specific Language Disability (developmental dyslexia)

2. Attention Deficit Disorder

3. Emotional overlay manifested by anxiety and depression.

EXHIBIT 2--COMPLAINANT-Lucy Davis

Mrs. Lucy Davis evaluated Shannon on July 31, August 6, 8, 1985. She used the Stanford Achievement Test-Intermediate 2, Form E and Advanced, Form E.

The test results revealed a level of 2-3 years below her grade assignment in reading and other language skills, a memory deficit, inadequate math skills, and below level achievement in social sciences and science.

Mrs. Davis feels that the test results gives strong indications of some specific learning disabilities. She recommends that Shannon be placed in an educational

setting that can deal satisfactorily with her particular needs.

EXHIBIT 3--COMPLAINANT--Kenneth Bailey

Shannon Carter was referred to Kenneth Bailey for a psychoeducational evaluation because of a suspected learning disability. Mr. Bailey evaluated Shannon on April 13, 1985.

The following tests were administered:

Weschler Intelligence Scale for Children-Revised
Bender Visual Motor Gestalt
Wide Range Achievement Test
Peabody Individual Achievement Test
Key Math Diagnostic Arithmetic Test
Woodcock Reading Mastery Tests

Mr. Bailey's analysis of the test data revealed that Shannon meets the criteria for learning disability placement, using the standard deviation difference formula as recommended by the State Department of Education.

Mr. Bailey's opinion is that Shannon is evidencing the need for remediation of both math and reading skills, and counseling in order to overcome many of the defenses she is utilizing to cope with her academic problems.

EXHIBIT 4--COMPLAINANT-Dr. Joe Neely

Shannon was referred to Dr. Neely for psychological testing as part of an overall evaluation for

possible learning disability. Dr. Neely did the evaluations on July 30 and August 2, 1985.

Shannon was administered the following tests:

Weschler Intelligence Scale for Children-Revised
Wide Range Achievement Test, 1984 Revision
Gray Oral Reading Test
Bender-Gestalt
Thematic Apperception Test
Kinetic Family drawings
Draw-A-Person Test

The test results are similar to those reported on tests by previous evaluators.

Dr. Neely found that Shannon displays considerable disparity between her verbal and performance skills within the area of intelligence. He feels that emotionally, she displays a significant degree of depression and anxiety, and that Shannon displays a specific learning disability within the area of language and reading.

He recommends that Shannon be involved in a program of regular psychotherapy and enrolled in a program of intensive remediation.

EXHIBIT 5--COMPLAINANT-Dr. Allison Grant

Dr. Allison Grant performed an out-patient Adolescent Psychiatric Evaluation on Shannon, July 9, 1985. The evaluation was done in two forty-five minute sessions.

His evaluation of Shannon included reviewing the psychological test results of both Ms. Summer and Mr. Bailey. He states that Shannon clearly demonstrates evidence of anxiety about achievement/performance and demonstrates obvious anxiety and a decrease in verbal participation when comforted with new situations and/or testing situations. He feels this behavioral feature of Shannon's could be misinterpreted as passive-resistance.

Dr. Grant states that Shannon deserves a special education program that will aim at multi-sensory teaching, specifically for youngsters with a neurologically based learning disability. From information made available to him, Dr. Grant has determined that at present no such program is available in Florence County School District #4.

His report implies that Mr. Bailey may have limited understanding of neurologically based learning disabilities.

EXHIBIT 1--RESPONDENT-IEP

An individualized education program (IEP) for Shannon Elaine Carter which was written and signed by required participants on May 1, 1985.

EXHIBIT 2--RESPONDENT-Parent Authorization for Placement Form

Florence County School District # 4 Parent authorization for Placement Form #11 for Shannon Carter.

Documentation of parental consent for initial placement of Shannon E. Carter in a program providing special education and related services.

EXHIBIT 3--RESPONDENT--Test Results

CTBS results for Shannon E. Carter--April 1983
BSAP results for Shannon E. Carter--May 1984

These test results indicate her achievement and academic level of functioning.

EXHIBIT 4--RESPONDENT-Scholastic Record

Scholastic record for Shannon Carter complete with grades for the academic year 1984-85. (4½ units-earned)

EXHIBIT 5--RESPONDENT-Evaluation Summary and Staffing Report

Evaluation Summary and Staffing Report for Shannon Carter was conducted May 1, 1985.

The report includes:

Instruments administered
Summary of team evaluation
Committee's recommendation for placement and reevaluation
Reasons for recommendations
Signatures (required)

FINDINGS

The relevant evidence presented at this hearing is the test data and school records.

Shannon was tested by five (5) evaluators, and they all agreed that she has a learning disability.

The IEP prepared for Shannon Elaine Carter on May 1, 1985 was complete. The parents wish to continue counseling from Ms. Summer rather than utilize services of the school guidance counselor.

The parent authorization for placement form was signed by Mrs. Elaine Carter on May 1, 1985 and she was provided with a document listing her rights with regards to evaluation and/or placement of her child into/out of programs for the handicapped.

The evaluation summary and staffing report was communicated to Mrs. Carter on May 1, 1985. The committee's recommendation for placement was accepted as evidenced by signatures of all committee members. The model accepted was itinerate.

The grade sheet shows that Shannon earned 4½ units during the 1984-85 school year. Grades improved considerably during the second semester of the 1984-85 school terms.

The IEP, approved at the May 1, 1985 meeting, was challenged at the hearing. Mrs. Carter and Ms. Summer are not satisfied with: 1) the district's goal of improving Shannon's total reading level from 5.4 grade level to the 5.8 grade level as measured by the

Woodcock reading Mastery Tests, 2) improving math skills from the 6.4 grade equivalent to the 6.8 grade equivalent as measured by the Key Math Diagnostic Test, by June 1986.

DECISION AND RATIONALE

I find Florence County School District #4 innocent of the charges brought against it by Mr. and Mrs. Emory Carter.

My decision is limited to the specific complaints which were the issues to be resolved.

ISSUE 1.

Florence County School District #4 refused to provide an adequate program for Shannon Carter.

RESPONSE 1.

Mrs. Nelson responded to a request for an evaluation of Shannon. The evaluation was done by Kenneth Bailey on April 13, 1985. The results revealed that Shannon met the criteria for learning disability placement. On May 1, 1985, Mrs. Nelson completed an Evaluation Summary and Staffing Report, held the IEP conference with the appropriate committee and completed the Parent Authorization for Placement Form.

The new program was implemented on May 2, 1985.

ISSUE 2.

The IEP and the amount of instruction provided by the school district in the 1984-85 school year was inadequate to meet Shannon's needs.

RESPONSE 2.

The IEP was presented and discussed at a meeting held on May 1, 1985. The document has the signature of Emory D. Carter, Elaine P. Carter, Linda M. Summer plus seven (7) members of the school district.

The following statement appears at the bottom of the document:

Note: Parents and school personnel may request another IEP meeting at any time they feel that a change is needed in the student's IEP.

ISSUE 3.

No program exists in Florence County School District #4 to deal with Shannon's learning disability.

RESPONSE 3.

Shannon Carter's learning disability was diagnosed as mild, in a majority of the evaluations. She was placed in the LD itinerate model.

There are programs available in the district that are more restrictive than the one chosen for Shannon. If test data or performance indicated a need for a change in placement, a reevaluation would be done and a change in placement could take place.

Respectfully submitted,

/s/ Heyward S. Rosemond
Heyward S. Rosemond,
Hearing Officer

APPEAL PROCEDURES

If you disagree with my decision, you may appeal to the State Education Agency (SEA) within ten (10) calendar days after receiving this notice; Otherwise my decision is binding.

Parties appealing my decision must submit the appeal in writing to the Office of Programs for the Handicapped, State Department of Education. Where parents are unable to communicate through written correspondence, a person representing the parents, or a member of the LEA staff, as determined by the Superintendent, may prepare the appeal in behalf of the parents. Parties submitting an appeal to the SEA must insure that the appeal is in writing and it includes the following:

1. An electronic verbatim or written transcript of the LEA hearing.

2. A statement of the decision following the LEA hearing, the specific points being appealed and copies of all items entered as evidence. The appellant may also include written argument.

Any party filing an appeal must notify the other party of such and provide a copy of the appeal, including written arguments to the other party.

STATUTORY AND REGULATORY PROVISIONS

20 U.S.C. § 1401. Definitions

(a) As used in this chapter --

* * *

(18) The term "free appropriate public education" means special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

* * *

(20) The term "individualized education program" means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include--

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency responsibilities or linkages (or both) before the student leaves the school setting,

(E) the projected date for initiation and anticipated duration of such services, and

(F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

In the case where a participating agency, other than the educational agency, fails to provide agreed upon services, the educational agency shall reconvene the IEP team to identify alternative strategies to meet the transition objectives.

20 U.S.C. § 1412. Eligibility requirements

In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

20 U.S.C. § 1413. State plans

(a) **Requisite features.** Any State meeting the eligibility requirements set forth in section 1412 and desiring to participate in the program under this part shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall--

* * *

(4) set forth policies and procedures to assure -

* * *

(B) that--

(i) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this part) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this part or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State; and

(ii) in all such instances, the State educational agency shall determine whether such schools and

facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

20 U.S.C. § 1415. Procedural Safeguards

(e) Civil action; jurisdiction

(2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and any party aggrieved by the findings and decision under subsection (c), shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

34 C.F.R. Ch. 111. Office of Special Education and Rehabilitation Services, Education

§ 300.349 Individualized education program--accountability.

Each public agency must provide special education and related services to a handicapped child in accordance with an individualized education program. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

§ 300.401 Responsibility of State educational agency.

Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services:

(1) In conformance with an individualized education program which meets the requirements under §§ 300.340-300.349 of subpart C;

(2) At no cost to the parents; and

(3) At a school or facility which meets the standards that apply to State and local educational agencies (including the requirements in this part); and

(b) Has all of the rights of a handicapped child who is served by a public agency.

§ 300.347 Private school placements.

(a) *Developing individualized education programs.*

(1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with § 300.343.

(2) The agency shall insure that a representative of the private school facility attends the meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school or facility, including individual or conference telephone calls.

(3) The public agency shall also develop an individualized educational program for each handicapped child who was placed in a private school or facility by the agency before the effective date of these regulations.

(b) *Reviewing and revising individualized education programs.*

(1) After a handicapped child enters a private school or facility, any meetings to review and revise the child's individualized education program may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall insure that the parents and an agency representative:

(i) Are involved in any decision about the child's individualized education program; and

(ii) Agree to any proposed changes in the program before those changes are implemented.

(c) *Responsibility*. Even if a private school or facility implements a child's individualized education program, responsibility for compliance with this part remains with the public agency and the State educational agency.

S.C. Code Regs. 43-62K

The following requirements must be satisfied for any specific area of exceptionality with the exception of Generic Special Education:

1. Bachelor's Degree.
2. Professional Certificate at the Elementary, Middle School or Secondary level.
3. Minimum qualifying score on South Carolina State Board of Education required examination.
4. Specialized Preparation--21 semester hours as specified.

a. Educable Mentally Handicapped	Semester Hours
(1) Human Growth and Development or Equivalent	3
(2) Teaching of Reading	3
(3) Introduction or Psychology of Exceptional Children	3
(4) Nature or Psychology of the Mentally Handicapped	3
(5) Educational Procedures for the Mentally Handicapped	3
(6) Elective courses (two courses to be elected from the following:)	6
Art Education	
Nature of Emotionally Disturbed	
Principles of Speech Correction	

Educational Assessment	
Physical Education and Recreation for the Exceptional Child	
Teaching of Language Arts for the Mentally Handicapped	
Teaching of Mathematics for the Mentally Handicapped	
Introduction to Rehabilitation and Community Services	
Theories of Learning	
Educational Procedures for Culturally and/or Educationally Handicapped Youth	
Practicum in Instruction of Exceptional Children	
Learning Disabilities	
Psychological Aspects of Disability	

b. Emotionally Handicapped	Semester Hours
(1) Human Growth and Development or Equivalent	3
(2) Teaching of Reading	3
(3) Nature of Emotionally Handicapped	3
(4) Educational Procedures for Emotionally Handicapped	3
(5) Practicum in Instruction for the Emotionally Handicapped	3
(6) Elective courses (two courses to be elected from the following:)	6
Introduction to Exceptional Children Educational Assessment	
Remedial Reading	
Theories of Personality	
Teaching of Mathematics	

Introduction to Rehabilitation and Community Services
Educational Procedures for Culturally and/or Educationally Handicapped Youth
Educational Psychology
Physical Education and Recreation for the Elementary School Child
Learning Disabilities

c. Generic Special Education

(1) Bachelor's Degree.

(2) Professional Certificate in either Educable Mentally Handicapped, Emotionally Handicapped or Learning Disabilities.

(3) Minimum qualifying score on South Carolina State Board of Education required examination.

(4) Complete a NASDTEC, NCATE, or State Board of Education approved program for initial certification in Generic Special Education.

OR

(a) If certified in one area listed above, must present three semester hours of coursework or practicum in each of the two remaining areas relative to characteristics or teaching procedures;

OR

Six semester hours in generic special education coursework to include nature, teaching procedures, career education, or assessment of the mildly handicapped;

OR

A combination of three semester hours of categorical and three semester hours of generic special education coursework.

(b) If certified in two of the areas listed above, must present three semester hours of coursework or practicum in the remaining area relative to characteristics or teaching procedures;

OR

Three semester hours in generic special education coursework to include nature, teaching procedures, career education, or assessment of the mildly handicapped.

d. Hearing Handicapped

	Semester Hours
(1) Human Growth and Development or Equivalent	3
(2) Teaching of Reading	3
(3) Methods of Teaching Speech Reading	3
(4) Psychology of Hearing Handicapped	3
(5) Teaching of Language to Hearing Handicapped	3
(6) Elective courses (two courses to be elected from the following:)	6
Introduction to Exceptional Children	
Educational Assessment	
Anatomy of the Auditory and Speech Mechanism	
History of Education and Guidance for the Hearing Impaired	

Audiology, Hearing Aids, and Auditory Training
Methods of Teaching Elementary School Subjects
Principles of Speech Correction
Physical Education and Recreation for the Exceptional Child
Nature of Emotionally Disturbed
Learning Disabilitites
Remedial Reading
Practicum in Instruction of the Exceptional Child
Introduction to Rehabilitation and Community Services
Educational Psychology

e. Learning Disabilities

		Semester Hours
(1)	Human Growth and Development or Equivalent	3
(2)	Teaching of Reading	3
(3)	Characteristics of Learning Disabilities	3
(4)	Educational Procedures for Learning Disabilities	3
(5)	Practicum in Instruction with Learning Disabilities	3
(6)	Elective courses (two courses to be elected from the following:)	6

Educational Assessment
Introduction to Exceptional Children
Remedial Reading
Practicum in Instruction of Learning Disabilities
Nature of Emotionally Handicapped
Language Arts

Introduction to Rehabilitation and Community Services
Educational Procedures for Culturally and/or Educationally Handicapped Youth
Theories of Learning
Educational Psychology
Physical Education and Recreation for the Exceptional Child
Physical Education and Recreation for the Elementary School Child

f. Orthopedically Handicapped

		Semester Hours
(1)	Human Growth and Development or Equivalent	3
(2)	Teaching of Reading	3
(3)	Nature of Crippling and Chronic Health Problems	3
(4)	Introduction to Exceptional Children	3
(5)	Practicum in Instruction for Orthopedically Handicapped	3
(6)	Elective courses (two courses to be elected from the following:)	6

Educational Assessment
Learning Disabilities
Principles of Speech Correction
Introduction to Rehabilitation and Community Services
The Nature of Emotional Disturbance
Educational Procedures for Culturally and/or Educationally Handicapped Youth
Educational Procedures for Orthopedically Handicapped
Remedial Reading

Educational Procedures for Mentally Handicapped
Educational Psychology
Psychological Aspects of Disability

g. Trainable Mentally Handicapped

		Semester Hours
(1)	Human Growth and Development or Equivalent	3
(2)	Teaching of Reading	3
(3)	Introduction or Psychology of Exceptional Children	3
(4)	Nature or Psychology of the Mentally Handicapped	3
(5)	Educational Procedures for the Mentally Handicapped	3
(6)	Elective courses (two courses to be elected from the following:)	6

Art or Music for the Elementary School Child
Nature of Emotionally Disturbed
Principles of Speech Correction
Educational Assessment
Physical Education and Recreation for the Exceptional Child
Teaching of Language Arts for Handicapped
Teaching of Mathematics for Handicapped
Introduction to Rehabilitation and Community Services
Theories of Learning
Educational Procedures for Culturally and/or Educationally Handicapped Youth
Practicum in Instruction of Exceptional Children

Learning Disabilities
Psychological Aspects of Disability

h. Visually Handicapped

		Semester Hours
(1)	Human Growth and Development or Equivalent	3
(2)	Teaching of Reading	3
(3)	Nature of Visually Handicapped	3
(4)	Educational Procedures for Visually Handicapped	3
(5)	Introduction to Exceptional Children	3
(6)	Braille -- Reading and Writing	3
(7)	Orientation and Mobility for the Classroom Teacher	3
(8)	Practicum in Instruction of the Visually Handicapped Child	3
(9)	Anatomy, Physiology, and Function of the Eye	3

(Practicum may be removed with one year of successful teaching experience with visually handicapped children.)

S.C. Code Regs. 43-243(E)

7. Whenever handicapped children are placed in private schools by the SEA/LEA, such private schools must be in compliance with the standards of the SEA/LEA. Private schools located within South Carolina shall meet standards that apply to the SEA/LEA in South Carolina. When the SEA/LEA places a handicapped child in a private school in another State, that school must meet the standards that apply to the SEA/LEA of the State in which the private school is located.

Minimal standards for all children including the handicapped receiving public education in South Carolina are outlined in the Defined Minimum Program for South Carolina School Districts (DMP). Private schools located within South Carolina in which handicapped children have been duly placed by LEAs, must be in comformity with the standards set forth in the DMP. In order to insure that such handicapped children duly placed in private schools by LEAs have all the rights they would have if educated in a public school, the SEA shall require that the private school officials sign a contractual agreement with the LEA/SEA insuring compliance with the following requirements:

a. That the handicapped child be evaluated in accordance with the Procedures for Survey, Screening, Evaluation, Placement and Dismissal of Children Into/Out of Programs for the Handicapped approved by the State Board of Education on March 12, 1976.

b. That the handicapped child be accorded all the rights afforded by P.L. 94-142 including the right to confidentiality, procedural safeguards and non-discriminatory assessment.

c. That the local education agency shall have responsibility for, but assisted by the school in the development of a written individualized education program and that the individualized education program will be revised at least annually.

d. That the handicapped child be educated in the least restrictive environment appropriate to implement the child's individualized education

program without reducing the quality of services required.

Defined Minimum Program for South Carolina School Districts (1986)

Grades 9-12

I. Qualifications of School Personnel

• • •

C. Teacher

A teacher is required to hold at least the bachelor's degree, or a degree equivalent, from an approved college or university and be certified to teach the subjects assigned. Trade and industrial teachers shall hold a trade certificate.

Exceptions to this standard are:

1. A teacher who is assigned to teach a subject in a majority of class periods in areas for which he is not properly certified must have completed 12 semester hours of credit in the subject area assigned. Annually, by October 15, the district superintendent shall request an out-of-field permit from the Office of Teacher Education and Certification for each teacher not properly certified. The teacher must earn six semester hours toward proper certification each year for renewal of the out-of-field permit.

2. A teacher who is teaching a majority of classes in areas in which he is properly certified may be

given teaching assignments in subject areas for which he is not properly certified if the teacher has completed the minimum of six semester hours of college credit in the subject areas assigned.

3. Annually, by October 15, the district superintendent shall request an out-of-field permit from the Office of Teacher Education and Certification for each person scheduled to teach at least half-time out of his area of certification.

4. A teacher of handicapped pupils in the resource or itinerant model shall be certified, or have a permit in the area of handicapping condition in which the majority of students are classified, or be certified in one area of handicapping condition in which the teacher is teaching and successfully complete six semester hours annually toward certification in the area in which the majority of students are classified. Pupils participating in self-contained programs shall be of the same category of disability. The teacher must be certified or hold a permit in the area of handicapping condition in which the majority of the pupils are served.

A school shall not have more than 10 percent of classroom instruction time taught by teachers who are not properly certified (for example: a teacher on a permit or assignment in a subject area for which he is not properly certified). The 10 percent is calculated by dividing the total time of teachers teaching out of their area of certification by the total instructional time. Exception: Resource teachers are not counted in computation.